No. 11992.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT.

POWER SERVICE CORPORATION, A CORPORATION, APPELLANT,

VS.

W. E. JOSLIN, DOING BUSINESS AS CORY-JOSLIN AND MACNSONS, APPELLEE.

APPELLANT'S PETITION FOR REHEARING.

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Comes now appellant in the above-entitled cause and moves the court to grant it a rehearing upon the following grounds:

1. This court, as grounds for denying the relief prayed by appellant, found as a fact that appellant and appellee had entered into a valid contract before the written contract was signed by the parties and approved in writing by the architect-engineer-manager and the contracting officer, which finding was based on an inference that appellant, by proceeding with the work before the formal contract was executed, expressed the intention to contract and did contract with appellee, whether or not a written contract was formally executed.

2. This finding by this court is diametrically opposed to the finding of fact made by the trial court.

3. The trial court's finding of fact is not clearly erroneous within the meaning of Section 52a of the Federal Rules of Civil Procedure.

4. No appeal was perfected from the finding of fact of the trial court.

5. This court erroneously held that the provision that the subcontract should be subject to the written approval of the architect-engineer-manager and the contracting officer, and should not be binding until so approved, was solely for the protection of the government; whereas appellant had the right to require that such approval be evidenced in writing.

THE FACTS.

In this case appellant obtained judgment in the trial court for damages due to delay in prosecuting a construction project caused by appellee's failure to furnish materials. Appellant appealed only from that part of the final judgment awarding damages in the amount of $3,753.15 instead of $34,326.88 (R. 109), but appellee perfected no appeal. The trial court found that there was no binding contract until the formal written contract was signed and approved in writing. This court held that there was a completed contract before the signed contract was executed, under the terms of which appellant was entitled to no damages whatsoever.

Appellant could not foresee that this court's decision would be based upon a question not raised by the appeal and consequently this is the first opportunity that appellant has had to be heard upon the question decided by the court.

Appellee invited bids for the erection of boilers in a powerhouse at Sunflower Ordnance Works in Kansas by means of a letter with a copy of specifications attached. These specifications, for the main part, described the proposed work and indicated how it should be done, but included the following provisions:

> "1.05.a. The subcontractor will be required to commence work under the subcontract within five (5) calendar days after the day of receipt by him of notice to proceed and will be required to prosecute said work faithfully and energetically and to complete the work within one hundred twenty (120) calendar days, the time to be computed from said date of receipt of notice to proceed, except as provided thereafter in this paragraph."

The specifications then provided for extension of time for completion if the contractor ordered the subcontractor to suspend work on account of unfavorable conditions, and in case the subcontractor failed to perform the work at a satisfactory rate by reason of delays in the delivery of materials and supplies because of war priorities or because of conditions existing through no fault or negligence of the subcontractor, and then provided as follows:

> "e. In case time for completion of the work is increased due to any of the causes specified herein it is distinctly understood and agreed that the subcontractor will accept the additional time in which to complete his subcontract in full satisfaction of any delays encountered, and the constructor will not be liable for any costs or expenses incurred by the subcontractor as a result of the increased time for completion of the subcontract.
>
> "f. Inasmuch as the provisions of the subcontract documents relating to the time for and the rate of performance of the work and the time for completion of the same are inserted for the purpose of enabling the

United States Government to proceed with the construction of the Sunflower Ordnance Works with its predetermined program of war effort, such provisions are of the essence of the subcontract.

"1-29. The subcontract shall be subject to the written approval of the architect-engineer-manager and the contracting officer, and shall not be binding until so approved."

Pursuant to this invitation to bid, appellant filed a written bid which recited that,

"The undersigned agrees, upon receipt of written notice of the acceptance of this offer within sixty days after the date of opening the offers, to execute the form of contract in accordance with the offer as accepted, and give payment and performance bond, with good and sufficient surety or sureties, for the faithful performance of the contract, and for the protection of all persons supplying labor and materials in the prosecution of the work, within two days after the prescribed forms are presented for signature.

"Performance will begin within five calendar days after the receipt of notice to proceed and will be completed as specified in paragraph 1-05 of the specifications."

Written notice to proceed was mailed to appellant and received on July 13, and a written unexecuted contract was mailed to appellant for its signature on July 14. The appellant started the contemplated work by taking an inventory of the materials on hand, but refused to sign the contract as prepared because it provided for completion in 120 days without including any provision to compensate appellant for damages if delay in performance should be caused from shortage of materials which were to be supplied by appellee. After repeated conferences by mail and otherwise, a clause was added to the written contract as follows:

"This contract is signed and executed by the Power Service Corporation without any intent on the part of the corporation to abandon or convey any rights which it may have to submit, prove and collect damages by reason of the late delivery of materials notwithstanding the provisions of Par. 1-05 of the specifications."

ARGUMENT.

1. From the above facts it appears that appellee, when it asked for bids, expressly provided that the contract should be subject to the written approval of the architect-engineer-manager and the contracting officer, and should not be binding until so approved. With full knowledge of that reservation appellant made a written bid in which it offered, upon receipt of notice of the acceptance of the offer, to execute the form of contract in accordance with the offer as accepted and give payment and performance bond. Therefore, when the bid was accepted each party had served notice on the other that it was not contemplated that mere acceptance of the bid would amount to a contract between the parties. One offered to contract provided written approval of the advertised terms should be obtained, and the other offered to enter into such a contract by executing a formal contract and giving a performance bond. If nothing more had occurred no judge or jury would be permitted to find that the parties had entered into a binding contract.

The only evidence tending to show that each party had waived a written signed contract and approval in writing is that appellee notified appellant to proceed with the work and appellant, before the formal contract was executed and approved in writing, proceeded to take an inventory which was the first step required for performance of the contemplated contract.

Conceding, for the sake of argument, that such conduct will support an inference that the parties actually entered into a contract before any formal written contract was signed and before any written approval thereof was obtained, nevertheless, merely proceeding with the work does not, as a matter of law, constitute the making of a contract, except the contract which the law implies and which will only support an action on *quantum meruit.* Such an implied contract does not contain the provisions of Section 1-05.e. of the specifications which this court held was a bar to appellant's right for damages for delays in furnishing materials.

The fact that appellant was directed to and did proceed with the work is only circumstantial evidence susceptible of more than one legitimate inference. The tremendous number of cases in *quantum meruit* and *quantum valebant* conclusively prove that it is very common practice for one person to proceed to furnish labor, material or merchandise to another before the parties have made a contract fixing their respective rights and liabilities. This is especially true when there is need for prompt action but the determination of the amount of compensation for damages and like matters requires deliberation.

In every case where the parties contemplate that the contract shall be reduced to writing before it is binding, but begin performance thereof before the contract is written and signed, the question as to whether or not their conduct shows that they actually entered into a contract before the written contract was signed is a question for the jury or the court sitting as a jury.

Hocking v. *Hamilton,* (C. C. A. 3) 122 Fed. 417.
Patrick v. *Smith,* (Tex.) 38 S. W. 17.
Morris Run Coal Co. v. *Carthage Sulphite, Pulp & Paper Co.,* 206 N. Y. S. 676.

New England Box Co. v. *Tibbetts,* (Vt.) 110 Atl. 434.

Saltzman v. *Barson,* (N. Y.) 146 N. E. 618.

H. G. Vogel Co. v. *Cauldwell-Wingate Co.,* 140 N. Y. S. 370.

Duplex Envelope Co. v. *Baltimore Post,* (Md.) 163 Atl. 688.

Taxi Service Co. v. *Gulf Refining Co.,* (Mass.) 147 N. E. 863.

Wood & Brooks Co. v. *D. E. Hewitt Lbr. Co.,* (W. Va.) 109 S. E. 242.

Universal Products Co. v. *Emerson,* (Del.) 179 Atl. 387.

Rosebud Oil & Cotton Co. v. *Merchants & Planters Oil Co.,* (Tex. Civ. App.) 248 S. W. 116.

Wharton v. *Stoutenburgh,* 35 N. J. Eq. 266.

Hopkins v. *Paradise Heights Fruitgrowers Ass'n,* (Mont.) 193 Pac. 389.

Heilman v. *Lazarus,* 90 N. Y. 672.

Park v. *Kansas City So. R. Co.,* 58 Pa. Super. Ct. 419.

Evidence that the parties contemplated the execution of a formal written contract is some evidence that their prior oral or other informal agreement by correspondence was merely tentative.

Universal Products Co. v. *Emerson, supra.*

Wharton v. *Stoutenburgh, supra.*

In addition to the evidence that the parties contemplated the execution of a formal written contract and the approval thereof in writing by the architect-engineer-manager and the contracting officer, there is evidence that the parties, by their own conduct, construed their tentative agreements and conduct to mean that there was no binding contract until the formal contract was signed and the approval thereof was procured in writing. When a

formal contract was sent to appellant to be signed it was not first signed by the appellee. This indicated that there would still be no contract, even though the document was signed by appellant, until it was returned for signature of appellee and approved in writing by the contracting officer. When appellant refused to sign the contract because shortage of materials threatened a delay which would result in damage, both appellee and the government officer were informed thereof. Neither one insisted that there was already a perfect contract, but they entered into negotiations for an additional provision for appellant's protection. They agreed upon this additional provision and then the formal contract was signed and the written approval was endorsed thereon. When appellant presented a claim for his damages it was refused, not on the ground that it was barred by the provisions of a contract made before the formal instrument was executed, but on the ground that appellee did not know the amount thereof.

All of this is strong evidence that both parties to the contract and the government officer all understood that no contract had been made before the formal written contract was signed and approved in writing. Furthermore, the circumstantial evidence tending to prove that a contract already had been made (appellee's direction to proceed with the work and appellant's compliance therewith) is greatly weakened by the fact that the parties knew that the purpose of the contract was to enable the government to proceed with dispatch in the war effort. Any patriotic citizen would be loath to refuse to begin to take an inventory, the purpose of which was to speed the war effort, merely because the details of a contract had not yet been worked out.

2. The trial court found that the only contract between appellee and appellant was the formal written con-

tract signed by the parties upon which was endorsed the written approval of the architect-engineer-manager and the contracting officer. The trial court made the following finding of fact:

> "Certainly there could be no binding contract until it was signed and approved. If the bid and acceptance was the complete contract there would have been no necessity for the bond, the written contract and the formalities leading up to its execution. The bid itself provided that it would not be binding until the contract and bond was executed and approved" (R. 102).

3. The trial court's finding that the parties did not enter into a contract until the written contract was signed and approved in writing is not clearly erroneous within the meaning of Section 52a of the Federal Rules of Civil Procedure. That rule provides that,

> "In all actions tried upon the facts without a jury, the court shall find the facts specifically and set out separately in conclusions of law thereon and direct the entry of the appropriate judgment; * * *. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

The rule was intended to give a very restricted power to the appellate court to reverse a trial judge's finding of fact only in cases where reasonable minds might not differ. It is not the intent of the rule to grant authority to an appellate court to reverse a trial judge simply because the appellate judges draw one legitimate inference from a state of facts and the trial judge drew another legitimate inference therefrom. This is not a case where a trial judge's finding of fact is supported by the testimony of a witness who tells an incredible story or who has been impeached and whose story is contradicted by a large volume of testimony. It is a case where the parties contem-

plated and expressly stated there should be no contract except a formal written contract signed and approved in writing. They nevertheless proceeded with the initial work to be done before they had executed the contemplated written contract because the work was intended to speed the war effort. But both parties pursued a course of conduct plainly indicating that they did not consider that a contract had been made.

In view of the tremendous number of cases in which a party has been compelled to sue on *quantum meruit* or *quantum valebant* because performance of a contemplated contract was undertaken before there was any meeting of the minds fixing the rights and liabilities of the parties, it cannot be said that the finding of the trial court was capricious, arbitrary, unreasonable or clearly erroneous.

4. Even if appellee had perfected an appeal and specifically assigned as error the action of the trial court in finding that the formal written contract bearing the written approval of the architect-engineer-manager and the contracting officer was the only contract between the parties, this court should sustain the action of the trial court; because to do otherwise would be to hold that Section 52a of the Federal Rules of Civil Procedure authorizes an appellate court to substitute its own appraisal of the evidence for that of the trial court whenever a suit at law is tried without a jury. But in a case where no party to the action has appealed from the finding of fact of the trial court, nor from any part of the judgment directly based thereon, it would certainly be contrary to the spirit of Section 52a, and a violent reversal of the practice which has heretofore obtained, for the appellate court to substitute its judgment for that of the trial court in determining which of two permissible inferences should be drawn from the evidence.

5. This court erroneously held that the provision in the specifications that the contract should be subject to the written approval of the architect-engineer-manager and the contracting officer, and should not be binding until so approved, was solely for the protection of the government. It is conceded that the reserved right of the government to prevent the parties from contracting by withholding its approval was solely for the protection of the government; but the provision that the approval should be *in writing* was for the protection of the government and both of the parties who proposed to contract.

The object of requiring the approval to be in writing was to avoid the hazards of a lawsuit in which the facts must be determined upon conflicting evidence and inferences to be drawn from the evidence. If the question as to whether or not a contract had been approved was to be determined without written evidence, neither party could be certain whether the contract had been approved or not until the verdict of a jury was returned. It was as important to the appellant that that hazard be removed as it was to the government.

If appellant had brought suit to recover upon a contract with the government in which it was provided that the contract would not be binding until approved by a certain officer, plaintiff would have a right to prove, if it could, that the government had, by its conduct, waived that provision of the contract. It by no means follows that after such a contract is signed the government may maintain suit for breach of the contract upon proof that by its conduct it had waived the written approval by the officer. The defendant would have the right to refuse to recognize the contract until it was approved in writing.

Whether or not both parties proceeded to enter into a contract without the written approval of the contracting

officer, because they both believed that the government had waived the provision for written approval, is a question of fact. The trial court had a right to take into consideration the evidence which showed that appellant proceeded upon the theory that there was no binding contract until it was approved in writing, and that the government officer apparently proceeded upon the same theory by giving his written approval of the formal contract which was finally signed and approved.

For the foregoing reasons appellant should be granted a rehearing in this cause.

Respectfully submitted,

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CERTIFICATE OF COUNSEL.

Lancie L. Watts, counsel for appellant, certifies that in his judgment the foregoing petition for rehearing is well-founded and that it is not interposed for delay.